

No. 14,216

IN THE

United States Court of Appeals
For the Ninth Circuit

ALDEN HANSEN,

Appellant,

vs.

SAFEWAY STORES, INCORPORATED, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

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JURISDICTIONAL STATEMENT.

Appellant's action was for patent infringement arising under Title 35, section 67 United States Code. It is an action on the case for damages for patent infringement.

Jurisdiction of the District Court is authorized by Title 28 United States Code, section 1338.

The jurisdiction of this Honorable Court to review the judgment rendered in the United States District Court is found in Title 28 United States Code, section 225.

ABSTRACT OF THE CASE.

This appeal is prosecuted after adverse judgment rendered by the trial Court pursuant to rule 50(b) of the rules of civil procedure. The jury failed to agree.

(Volume I, page 5.)

The sole question raised by this appeal goes to the propriety of the trial Court's granting defendant's motion for judgment as a matter of law.

In its memorandum for judgment (Volume I, page 54) the trial Court directed judgment for the defendant

“* * * because plaintiff's patent is invalid for lack of novelty, lack of invention, or lack of both novelty and invention.”

Of the great mass of alleged prior art and prior use introduced into evidence (of which only a small part was discussed at all), the Court did not indicate upon what alleged prior art or use, or otherwise, the decision was based.

Nor does the ultimate judgment of the trial Court reflect the direction in the memorandum for judgment, but states generally,

“* * * that there was no evidence offered and received in said cause which would justify a verdict in favor of plaintiff and against said defendant, and that the evidence was legally insufficient to support a verdict in favor of plaintiff * * *”

(Volume I, page 58, lines 19-22.)

Because of the sweeping language of the judgment, appellant conceives it his burden and duty to point out

substantial evidence sufficient to support a verdict in his favor, on every material issue. No other issues are raised by this appeal.

In appellant's outline of the factual background as revealed by the evidence, appellant will here endeavor to make a fair statement of the evidence, pointing out basic conflicts, where they exist, and drawing all favorable inferences where such may properly be drawn, as he is entitled to do in such a case.

Southern Pacific Company v. Souza, 179 F. (2d) 691 (9th Circuit).

FACTUAL STATEMENT.

In the early 1940's Alden Hansen, appellant-plaintiff, was employed by Safeway Stores, Incorporated, appellee-defendant. He worked, for the most part in the inventory control, and billing department. (Volume III, page 15, line 23 through page 16, line 4.)

His duties consisted of supervising a group of comptometer operators. (Volume III, page 284, lines 11-12.) His wages were approximately \$240.00 per month. (Volume IV, page 479, lines 15-16.) He was so employed by Safeway for a period of approximately 12 to 14 years, not continuous. (Volume III, page 15, lines 9-21.) There was a period between 1932 and 1934 when he was not employed by Safeway, but he thereafter returned to them at their request. (Volume 3, page 15, lines 14-19.)

The primary function of the office and department in which Hansen worked was to receive and integrate the statistical information received from the individual stores of the San Francisco zone area which was then comprised of approximately 200 individual stores. (Volume III, page 20, line 10.)

The information was received from the individual stores on invoices from which it was laboriously transcribed onto various manifests and forms then in use by Safeway. It was thereafter recapitulated as the records of the Safeway demanded to yield the desired information. (Volume 3, page 20, line 10.)

While working in this department Hansen noted that the system was both cumbersome and inefficient. It required more copy work than was necessary and was highly susceptible to error, particularly in view of the great amount of copy work wherein each step entailed substantial risk of error, both in the correct transcription of figures, as well as further risk of error in the placing correct figures on the correct column and page. (Volume III, page 16, line 11 through page 17, line 12.)

Hansen approached his superiors, a Mr. Mead, an auditor, and two office managers, Martin McCarthy and Oscar Witt, with the idea of working out a more efficient system. However, he was told "that all a statistical fellow would have to do would be to follow procedures as outlined by the general offices." (Volume IV, page 479, line 24 to page 480, line 13.)

Hansen did not abandon his idea and, on his own time, he worked out the business records invention which forms the basis of his patent and for which he ultimately received letters patent on June 18, 1946. (Plaintiff's Exhibit 1.)

After Hansen had perfected his invention he again approached his superior (Clarence Cambridge, office manager for San Francisco zone area) with the idea in rough form, worked out but not printed. Safeway then recognized the merits and possibilities of the invention and accepted it on a trial basis in the San Francisco zone office. It was there installed during June of 1942. It was thereafter expended to other zone areas of the Safeway from time to time. Safeway admitted by stipulation that it used forms substantially identical to plaintiff's exhibit 2 in the following zone areas between the following dates:

San Francisco, June of 1942 to March of 1947.

Fresno, California, May 1943 to June 1949.

Butte, Montana, October 1943 to September 1949.

Dallas, Texas, January 1945 to March 1950.

El Paso, Texas, January 1942 to June 1949.

Oklahoma City, January 1943 to January 1949.

Phoenix, Arizona, July 1943 to December 1949.

Salt Lake City, unknown date in 1942 and still in use December 17, 1952.

Omaha, Nebraska, September 1942 to December 1948.

Spokane, Washington, June 1943 to December 1948.

Seattle, Washington, October 1941 to December 1946.

Tulsa, Oklahoma, September 1942 to December 1948.

New York, July 1942 to December 1950.

The dates on the foregoing admission as read in the record vary slightly from the written stipulation on the same point which is also a part of the record, Volume 1, page 3.

The value to Safeway of the Hansen invention was hotly disputed. However, Hansen testified that his invention saved Safeway approximately \$5.00 per store, per month. Plaintiff's exhibit 3 shows the number of stores in the total affected areas during the period of use of the Hansen invention. The total savings was approximately \$350,000.00. Hansen further testified that reasonable compensation to him would have been one-fifth of what his invention saved Safeway. (One dollar, per store, per month.) (Volume IV, page 479, line 2.)

Hansen, at all times, expected compensation for his invention, and he so gave Safeway to understand. (Volume III, page 133, line 5, through page 135, line 8.) (Statement of inference on balance of last line stricken.)

Hansen's claim to compensation in excess of his regular wages was also denied by Safeway.

Hansen's invention was installed in the San Francisco zone office of the Safeway in June of 1942. On

December 14, 1942, he applied for letters patent. His application had a long history and the letters were not granted until June 18, 1946. In the interim the denial of his letters patent by the patent office and intermediate administrative authorities, was appealed to the United States Court of Customs and Patent Appeals where, by opinion of Presiding Judge, the Honorable Finis J. Garrett, the Court held the patent valid and ordered it to issue. (*In re Hansen*, 154 Federal (2d) 684.)

Meanwhile, Hansen continued his efforts to secure remuneration from Safeway for his invention and improvement and, on July 21, 1943, while he was still employed by Safeway, he wrote to Mr. Lingan A. Warren, who was then and, at the time of trial, was president of Safeway, reminding him of Safeway's commitment to compensate Hansen if his invention proved of value. (Plaintiff's Exhibit 5.)

Safeway made no written reply to this letter. However, Mr. Lou Cook, then San Francisco zone manager for Safeway, called Hansen into his office and, without stating his (Cook's) position on compensation one way or the other, attempted to "sound out" Hansen on whether he intended to sue Safeway. (Volume IV, page 481, line 19 through page 492, line 15.) Mr. Cook committed himself neither way on Safeway's position in the matter.

Nothing further was done and Safeway continued to use the Hansen patent until about the time when Hansen, through counsel, began to make demands

upon Safeway again (stipulated to be December 15, 1948. (Volume IV, page 500, line 18 through page 501, line 16.)

THE INVENTION.

The Hansen patent is simple. Instead of attempting to avoid error by forcing the human element, it contemplates and accepts it, and attacks the problem from the rear by laying the foundation for discovering and correcting error with great ease.

It is, perhaps best described by language of the United States Court of Customs and Patent Appeals which adopted language from appellant's brief before that Court:

“* * * the structure embraces four elements alleged to be basic, viz.: ‘* * * (1) a foundation form having columns, (2) indicia on said foundation form identifying such columns, (3) strips attachable in the columns of the foundation form in a manner to leave the column indicia exposed, and (4) corresponding or matching indicia on such strips.’

“The brief further alleges that ‘The absence of any one of the basic elements divests the invention of its identity,’ and ‘This is important from the viewpoint of the prior Art’ * * *”

(There follows a discussion of the refinement features.)

In re Hansen, 154 Federal (2d) 684.

SPECIFICATION OF ERROR.

THE TRIAL COURT ERRED IN DECIDING THE CASE AS A MATTER OF LAW PURSUANT TO RULE 50(b) AND FORECLOSING JURY CONSIDERATION THEREOF.

IF THERE IS ANY EVIDENCE SUFFICIENT TO SUPPORT THE VERDICT RENDERED, OR WHICH MIGHT BE RENDERED OF SUFFICIENT PROBABILITY AS WOULD ALLOW REASONABLE MINDS TO DIFFER ON THE QUESTION, THE MATTER IS FOR THE JURY TO DECIDE.

No proposition of law is more clearly defined, nor more often reiterated than the rule governing non-suits, directed verdicts, and judgments notwithstanding the verdict.

“* * * It may be granted *only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence*, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of plaintiff if such a verdict were given * * *”

In re Flood's Estate, 17 Cal. (2d) 763, 768, 21 Pac. (2d) 579, 580.

The jury's verdict is final on questions of fact.

Southern Pacific Company v. Souza, 179 F. (2d) 691;

Chrissinger v. Southern Pacific Company, 169 Cal. 619, 149 P. 175;

Crawford v. Southern Pacific Company, 3 Cal. (2d) 427, 429, 45 P. (2d) 183, 184;

(Both cited with approbation in footnotes to *Southern Pacific Company v. Souza*, 179 F. (2d) 691.)

Conflicting evidence is for the jury and not for the Court on motion for directed verdict.

Evidence on motion for directed verdict must be taken in the light most favorable to plaintiff.

Knott Corporation v. Furman, 163 F. (2d) 199, 207.

THE SCOPE OF EVIDENCE TO BE REVIEWED.

SINCE THE TRIAL COURT, BY ITS JUDGMENT, DID NOT SPECIFY THE BASIS FOR ITS RULING, APPELLANT HERE CONCEIVES IT HIS BURDEN ON THIS APPEAL TO POINT OUT TO THIS HONORABLE COURT SUBSTANTIAL EVIDENCE ON EVERY MATERIAL ISSUE OF SUFFICIENT PROBABILITY AND REASONABLENESS TO JUSTIFY AND SUPPORT A VERDICT FOR PLAINTIFF BELOW HAD SUCH BEEN RENDERED.

If the constitutional requirements and safeguards of trial by jury are to be preserved, it is important most carefully to scrutinize judgments which propose to take an issue of fact from the jury upon grounds that reasonable minds could not differ on the point and it has, thereby, become a question of law for the Court to decide. Inroads are dangerous.

It may be well for a trial judge, either when acting as trier of the fact, or deciding a motion for new trial, to say, "If it were for *me* to decide, I would decide for the defendant." It is quite another proposition to say, speaking for all reasonable persons, "Not

only would I decide for defendant, but *no reasonable person could do otherwise.*”

THE ESSENTIAL EVIDENCE.

Appellant here lists first what he conceives to be undisputed evidence. Evidence upon which there was substantial conflict will be discussed in more detail later.

No effort is here made to discuss *all* the evidence, favorable or otherwise as that would necessarily entail a complete restatement of the entire transcript (504 pages) in addition to appellant's comments thereon. Appellant's purpose is here merely to show that there is substantial evidence on every material issue sufficient to support a verdict in his favor. The issues will be taken up, as far as possible, in the approximate order in which they appear in the allegations of the complaint, followed by the affirmative defenses of the answer.

(1) Patent number 2,402,282 (Plaintiff's Exhibit 1), was duly issued to plaintiff and he is now, and at all times, has been the owner thereof. (Transcript of Record, Volume 3, page 2, lines 17-22.) (The question of shop right and whether Hansen developed his invention as a part of his duties as an employee of Safeway will be discussed later in this brief.)

(2) Safeway used forms "substantially identical" to Plaintiff's Exhibit 2, which are the actual forms

used in the Hansen patent application and correspond exactly with the patent itself.

(3) Hansen never made, sold, or licensed any other person to use his patent invention. (Transcript, Vol. III, page 21, lines 1-9.)

Constructive notice of the existence of all patents goes to all the world. Special notice is required *only* when patentee manufactures or vends without so indicating on the product.

Wine Railway Appliance Company v. Enterprise Railway Equipment Company, 297 U.S. 387, 80 L. Ed. 736.

The rule has been uniformly followed in *Sontag Chain Stores Co., Ltd. v. National Nut Company of California*, 310 U.S. 281, 84 L.Ed. 1204, 1212.

DAMAGES.

The measure of damages is

“* * * due compensation for making, using, or selling the invention, not less than a reasonable royalty therefor, * * *”

35 U.S.C. 70.

Determination of the proper measure of damages consisted of fixing a reasonable royalty for the use Safeway made of the Hansen invention from the time the patent issued until it was discontinued by Safeway. As appellant has previously stated in his factual summary, the issue was contested by Safeway.

Hansen testified that his invention saved the Safeway approximately \$5.00 per store, per month and that a reasonable royalty for such use would have been approximately \$1.00 per store per month (one-fifth of what his invention saved Safeway); (Transcript Vol. IV, page 479, line 2).

Witnesses for Safeway testified, on the contrary, that the Hansen invention was of no value. (Defendant's Exhibit AL.) Defendant's exhibit AL, purporting to be an office memo from Arthur Stewart, controller to Lingen A. Warren, president, dated July 26, 1943, states that

“* * * We cannot figure that there is any savings on the form as the number of persons employed had not decreased. In fact, it may have increased. * * *” (391/6-9.)

(The letter above referred to (Defendant's Exhibit AL) states many other facts of a most self-serving nature to Safeway. The original was signed only with typewritten initials “AS”).

We ask your Honors to note that it was *after* the date of the foregoing letter which denied the value of the Hansen invention that Safeway further expanded the use of the Hansen forms to the Butte, Montana zone (October 1943) and to the Dallas, Texas zone in January 1945. (Volume I, page 3.) The *most* that can be said of the Safeway denial of value is that it merely raises a conflict in the evidence.

Indeed, plaintiff endeavored to elicit from Mr. Warren what *he* would consider a reasonable royalty for the use of any product, tangible, or otherwise, which would be of saving to Safeway. This effort was totally unsuccessful. The witness refused to respond directly. (Transcript Vol. IV, page 408, line 3 through page 408, line 8.)

Safeway also produced an expert witness on the value of forms (Mr. Victor Thomas) whose testimony, although not directly related to the type of licensing, was also adverse to the amount of plaintiff's claim.

ISSUES RAISED BY DEFENDANT'S ANSWER.

After denying the affirmative allegations of plaintiff's complaint (the evidence in support whereof has been heretofore discussed in this brief), Safeway raised a number of affirmative defenses. They are here taken up in the order in which raised. In discussing these issues the same policy will be adhered to as in the previous issues discussed.

Paragraph 5 of defendant's answer (Volume I, page 10) sets forth 24 alleged prior art patents including one British unpatented application. Of these, the great majority were introduced in evidence in a group as one exhibit (Defendant's Exhibit AM) in a book without further comment thereon.

To the end that the Court's time will not be wasted by deep analysis of a large mass of alleged prior art

which, although pleaded, was not actually urged at the trial, appellant here conceives it his duty to permit appellee to demonstrate to this Court what it conceives to be the basis of its defense of lack of novelty and invention.

Appellant respectfully suggests that it is incumbent upon appellee not only in the lower Court, but in this Court as well, to point out where it contends that its claimed prior art and prior use invalidates the Hansen patent.

Were the rule otherwise, all efforts to correct error on appeal in this type of case could easily be avoided merely by citing such great multitudes of alleged prior art, with copies perfunctorily introduced into evidence. The ultimate result would be that a complete analysis thereof before this Court would be impossible unless the Court were to dedicate itself exclusively to such a case. No litigant is entitled so to presume upon the Court's time.

Appellant here will discuss the patents actually urged by Safeway at the trial and on Safeway's motion for judgment under rule 50(b). Before doing so, however, it may be well to reiterate certain basic rules governing patents, particularly those which concern the particular facts of this appeal:

The Court's attention is first respectfully invited to the fact that this is not the ordinary case of patent infringement. Here Safeway first received the basic idea by means of a confidential disclosure and *then*,

when called to account for its use thereof and unjust enrichment, took the position that the idea was not novel; was not useful; was not used; that it had the right to use it; that it did not use it; that it was not the invention of the patentee.

Safeway received from Hansen the essence of his invention and it installed it, as such, in its San Francisco zone office, whereafter, after trial, it was extended and expanded to a total of thirteen zone areas of the Safeway. A sound and prudent line of decisions looks with justifiable suspicion upon an alleged infringer who, after such confidential disclosure, raises such defenses. We believe your Honors will agree that the sound precepts of *Hoeltke v. C. M. Kemp Mfg. Co.*, 80 F. (2d) 912, 923, are most appropriate to the facts of this case:

“* * * where an unpatented device, * * * is set up as a complete anticipation * * * the proof sustaining it must be clear, satisfactory, and beyond a reasonable doubt. * * * And we think the same rule should be applied against one who admittedly receives a disclosure from an inventor, proceeds thereafter to manufacture articles of similar character, and, when called to account, makes answer that he was using his own ideas and not the ideas imparted to him. * * *”

Simplicity alone will not preclude invention.

Patterson-Ballagh Corp. et al. v. Moss et al.,
201 F. (2d) 403, (9th Circuit).

Among the patents actually urged as prior art, and anticipation, including one unpatented device, the

majority were almost entirely unrelated. However, having been so raised they will be discussed but solely to point out sufficient differences to justify the conclusion that any questions were merely questions of fact and properly the province of the jury.

In support of its motion for judgment under rule 50(b) Safeway considered three patents, and two alleged prior uses. They are:

The Iseri Patent, number 1,271,167. (Defendant's Exhibits AG, AH and AI.)

The Graham Patent, number 1,442,266. (Defendant's Exhibit AE.)

The Bach Patent, number 758,808. (Exhibit AF.)

The Pontiac Prior Use. (Defendant's Exhibits Q, R, S, and AJ.)

The Safeway's Prior Use. (Defendant's Exhibit U.)

Appellant here takes up the alleged prior art and anticipation in the same order as here listed:

THE ISERI PATENT.

The Iseri patent does not have matching indicia to indicate proper (or improper) columns. (It has the strips labeled to correspond with the sheet for which they are intended.) It does not contain (1) the plurality of columns; (2) indicia on said foundation form *identifying such columns*; (3) plurality of strips applicable to the columns of the foundation form and effectively shorter than such columns; and (4) matching indicia on the foundation form and strips. (The Iseri patent provides for the name of

the bookkeeping record on all transferred strips so that they will be affixed to the correct record.) The rest of the Hansen combination invention, they do not have.

Safeway produced an expert witness to testify. However, upon cross-examination, his background on bookkeeping forms was revealed to be somewhat lacking. We ask your Honors to note not only his admissions of what differences actually existed between the Hansen patent and the Iseri patent, but also to consider the difficulty with which he must have been handicapped in making his analysis in the light of his background in the particular field of patents in question (transcript Volume IV, page 463, *et seq.*):

“Q. What is the difference between a ledger and a journal?

A. I don't know.

Q. You don't know? What is this called, Mr. Lothrop?

A. That is one of the——

Q. (Interposing) What is a daily balance book?

A. I don't know. I am not a bookkeeper at all.

Q. You are not an expert on bookkeeping form at all, are you?

A. I said I wasn't a bookkeeper.

Q. Are you an expert on bookkeeping forms?

A. I don't know.

Q. Are you claiming to be here?

A. I am claiming, I think, to be an expert on the showing in the various patents which are involved here, and insofar as they show bookkeep-

ing forms, I think I have studied these reasonably well and am thoroughly familiar with them.

Q. But you don't know the difference between a ledger and a journal?

A. No, I don't, I don't think that makes any particular difference.

Q. As a matter of fact you testified your entire background is not in this type of work at all, but is engineering?

A. By 'this type of work' do you mean with respect to bookkeeping or do you mean with respect to patents * * *'

It may be worthy of note that this same expert testified that the patent offices assigned specialists to the analysis of the patent applications presented. (transcript volume IV, page 308, line 22-page 309, line 2.)

The Graham patent, heavily relied upon by Safeway, contains no matching indicia with gummed strips. It is based upon a principal of overlapping pages whereby the proper columns are reached if the forms are properly applied. It does not appear to contain the matching indicia left exposed after application of the strips to the foundation form. (This fact does not appear from the blown up exhibit of Safeway (defendant's exhibit AE) but is readily noted from an examination of the actual patent which is among the patents introduced by Safeway as one exhibit (defendant's AM).)

THE BACH PATENT.

The Bach patent, even with the strained construction which no jury need draw, and which is not claimed by the author (it is alleged to contain “gummed strips” referred to by the inventor as “perforated squares”), is not designed, nor capable of being used, as is plaintiff’s invention. The nearest resemblance is to be found in what might be considered the “matching indicia.” It was not conceived, nor used, nor capable of being used as is plaintiff’s invention. No reasonable construction of it (including the author’s own) contains any “gummed strips.” It is a coupon book—no more, no less.

In regard to the Bach patent, the language of *Bianchi v. Bianchi*, 168 F.(2d) 793, (9th Circuit), at page 803 again becomes appropriate:

“* * * In determining the question of infringement, the court is not to judge about similarities or differences by the names of things, but is to look at the machine or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it. * * * One does not escape infringement by providing a single element which fully responds to a plurality of elements in the patent.”

THE PONTIAC PRIOR USE.

The Pontiac alleged prior use (Exhibits Q, R, S, and AJ) contains no matching indicia and, rather than anticipating the Hansen patent, illustrates graphically the need for it. We again call Your

Honor's attention to the cross-examination of the expert witness of Safeway on the point. (Transcript Vol. IV, page 432, line 17-433/2, referring to defendant's exhibits R and S.)

"Mr. Bortin. Q. The teachings of this invention does not help in any way in locating errors once made?

A. Not that I know of, I couldn't say.

Q. The plaintiff's invention. The plaintiff's invention does, however, doesn't it?

A. I think it could, yes.

Q. Well, as a matter of fact, it does definitely; there is no question about it, is there?

A. I have never worked the plaintiff's alleged invention. I assume it works the way it says in the patent; I think that is right."

SAFEWAY'S OWN ALLEGED PRIOR USE.

The Safeway's own alleged prior use (defendant's exhibit U), is utterly foreign to the teachings of the Hansen patent. It consisted of no more than pasting sheets in a book after the information had been accumulated thereon. On cross-examination the Safeway's own officer and witness stated at Vol. III, page 253, lines 2-5):

"Q. Yes, there are columns there. The only relationship is the fact that you use glue and the fact that you use columns?

A. *Yes.*"

* * * * *

Of the patents relied on by Safeway, none cover the four basic elements *in combination* which form

the essence of the Hansen patent. The foregoing analysis was made merely to show that the Hansen invention differs materially and substantially from the prior art proposed by Safeway.

A patent that teaches merely an improvement in a familiar process merits a reasonably liberal construction.

Bianchi v. Bianchi, 168 F. (2d) 793 (9th Circuit).

Of all the language which is most fitting in regard to inventions, appellant submits that it is that of *Diamond Rubber Co. v. Consolidated Rubber Tire Company*, 220 U.S. 428, extended and quoted with approbation in *Patterson-Ballagh Corp. v. Moss*, 201 F(2) 403 at page 406:

“* * * It is quite apparent that simplicity alone will not preclude invention. Hindsight tends to color the seeming obviousness of that which in fact is true contribution to prior art. ‘Knowledge after the event is always easy, and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skillful attention.’ ”

Safeway referred to one other patent which was originally cited by the patent office but was not referred to in the opinion of the United States Court of Customs and Patent Appeals. This was the Groby patent, number 1,461,757.

Safeway's expert witness testified that this patent had "gotten lost along the way somewhere." (Transcript Vol. IV, page 323, lines 10-11.) He immediately admitted he did not know what happened to it. (Transcript Vol. IV, page 323, lines 14-18.)

The Groby patent was not urged in Safeway's motion for judgment under rule 50(b). This is not surprising in view of the admission of defendant's expert. (Vol. III, page 421, lines 12 through 19.) The Groby patent contains no matching indicia.

Safeway took the position throughout that the alleged prior art patents had been overlooked by the patent office.

We respectfully call to Your Honors' attention the language of *Artmoore Co. v. Dayless Mfg. Co.*, 208 F. (2d) 1, which states, in part:

"* * * It has been held, and we think with logic, that it is as reasonable to conclude that a prior art patent not cited was considered and cast aside because not pertinent, as to conclude that it was inadvertently overlooked."

The above cited case further sagely states:

"It is unrealistic to reason that Rogers did nothing more than might be expected of the skilled mechanic, when neither the owners of such prior art patents nor any member of the public after their expiration discovered that their teachings were worth reducing to practice."

Following its contention of prior art and anticipation, Safeway next urged (Vol. I, page 13, lines 21-24), that the Hansen invention was not practical and therefore without utility.

On this question, the evidence has already been reviewed in this brief. The invention was installed on a trial basis in San Francisco, and thereafter expended from time to time throughout the country. (Transcript, Vol. III, page 137, line 20 through 139/4.)

Next in order (Vol. I, page 13, line 25-page 14, line 3), Safeway contends that a business record system is not properly the subject matter of protection under the United States Patent Laws.

We respectfully submit to your Honors that the rule of *stare decisis* should apply, and the opinion of the United States Court of Customs and Patent Appeals should control on the point.

Paragraph 6 of defendant's answer denies infringing use. On this point the evidence has already been discussed, particularly with reference to the admissions of Safeway. (Vol. III, page 137/18 and following.)

Paragraph 7 (Vol. I, page 14, lines 9-13) of defendant's answer admits the use of the forms which are stipulated to be "substantially identical" to those upon which the Hansen patent is based. (Plaintiff's exhibits 1 (the patent) and 2 (the forms admittedly used by Safeway).)

Paragraph 8 of defendant's answer (Vol. I, page 14, line 18 through page 15, line 6) "admits" the use of non-infringing forms.

This paragraph does not deny the use of the Hansen forms as elsewhere admitted in substance by Safeway.

Paragraph 9 (Vol. I, page 15, lines 7-19) raises the affirmative defense of shop right. The facts regarding this defense have been discussed:

Mr. Cambridge, the office manager for the San Francisco zone office, admitted on cross-examination that Hansen had his invention in rough form and that all the Safeway did was to pay for the printing of the forms *it used in its own business*. (Vol. IV, page 299, lines 3-20):

"Mr. Bortin. Q. Now, may I ask you one more question, Mr. Cambridge? Isn't it a fact that when you first saw Mr. Hansen's idea or patent it was in final form?

A. No.

Q. You deny that?

A. I deny that. *We had to do a lot of printing.*

Q. You did the printing?

A. We did the printing later.

Q. I am talking about the idea. The thought was worked out?

A. The idea was worked out, yes, a rough drawing.

Q. Yes.

A. That's right.

Q. You did the printing and you paid for the printing?

A. Yes.

Q. But the forms you printed you used for Safeway, didn't you?

A. Yes.

The law regarding license and shop right is ably expounded in *Barton v. Nevada Consolidated Copper Co.*, 71 F. (2d) 381, from which it appears that Safeway had neither shop right nor license.

Paragraph 10 of defendant's answer (Vol. I, page 15, line 20) denies that Hansen is entitled to damages prior to the issuance of the patent. With this contention, appellant has no quarrel.

CONCLUSION.

Upon every issue raised, either by general issue, or affirmative defense, the very most that can be said for appellee is that issues of fact only are raised.

We respectfully submit to your Honors that under such circumstances, the decision was for the jury, and the judgment rendered should be reversed with directions to the District Court to grant a new trial.

Dated, San Francisco, California,

July 14, 1954.

Respectfully submitted,

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